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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 171

EDDIE V. HANNA,
PETITIONER,

v.

EDWARD M. PLUMER,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

EDDIE V. HANNA,
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EDWARD M. PLUMER,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above-entitled case, entered April 29, 1964.

Citation to Opinions Below

The memorandum opinions of the District Court (R13-15) and of the Court of Appeals (R25-29) are both, as yet, unreported and are printed in Appendix B, and pages 13-15 of the record.

Jurisdiction

Jurisdiction of the United States District Court for the District of Massachusetts was invoked under 28 U.S.C. 1332(a)(1).

The judgment of the Court of Appeals was entered on April 29, 1964 (R29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1948).

Question Presented

Whether in a civil action, where the jurisdiction of the District Court is based on the diversity of citizenship between the parties, service of process shall be made in the mode and manner prescribed by state law or by the Federal Rules of Civil Procedure.

Statutes Involved

The statutory and constitutional provisions involved are *U.S. Constitution* Art VI, cl.2; 28 *U.S.C.* 2072 (1948); Rule 4(d)(1), Federal Rules of Civil Procedure; Mass. Gen. Laws (Ter. Ed.) c. 197 sec. 9 (1958). They are presented in Appendix A, infra.

Statement

This is an action brought in the United States District Court for the District of Massachusetts in which Mrs. Eddie V. Hanna, a citizen of Ohio, seeks to recover damages in excess of $10,000 for serious personal injuries sustained in an automobile accident caused by the negligence of a Massachusetts citizen now deceased and which occurred in South Carolina. The defendant, also a Massachusetts citizen, is

the decedent's executor. Jurisdiction of the United States District Court was based on diversity of citizenship. The defendant qualified as executor by filing a probate bond on March 1, 1962. The complaint was filed on February 6, 1963, and on February 8, 1963, the deputy United States Marshal served the defendant, by leaving a copy of the complaint and summons at the defendant's last and usual place of abode in the hands of his wife, (R2) in full compliance with Fed. R. Civ. Pro., Rule 4(d)(1). The defendant filed his answer on February 26, 1963.

Mass. Gen. Laws (Ter. Ed.) c. 197, sec. 9 (1958) provides that actions against an executor must be "commenced within one year from the time of his giving bond." In addition to this requirement of timely commencement, the statute requires that before the expiration of the year the executor must be served in hand; unless a notice of the claim is on file in the appropriate registry of probate, or unless the executor "accepts" service. (The plaintiff's Ohio counsel did file such a notice, but it was technically invalid, as it did not state the name of the court in which the claim was pursued, R20-21.)

The defendant propounded interrogatories to the plaintiff on August 5, 1963, (R1) and on August 26, 1963, moved for summary judgment on the ground that since jurisdiction was based solely on the diversity of citizenship between the parties, the failure of the plaintiff to make in hand service, as required by *Mass. Gen. Laws* (Ter. Ed.) c 197 sec 9 (1958), was fatal to the action. The District Court allowed the motion, and on appeal, the United States Court of Appeals for the First Circuit, Aldrich, J., affirmed.

Reasons for Granting the Writ

1. The Decision of the Court of Appeals Raises Important Federal Statutory and Constitutional Questions involving the Federal Rules of Civil Procedure.

There is no question of the timeliness of the plaintiff's action, for as the Court of Appeals noted, ". . . the action was commenced in time and served in time. . . ." (R27), for purposes of other Massachusetts statutes of limitations. The action was also timely for purposes of *Mass. Gen. Laws* c. 197, sec. 9 (1958) as well, because for purposes of the statute here involved, as for other Massachusetts statutes, an action is "commenced" when process is delivered to an appropriate officer with the intent that he serve it. *Gray* v. *Dahl*, 297 Mass. 260, 8 N.E. 2d 919 (1937); *Parker* v. *Rich*, 297 Mass. 121, 8 N.E. 2d 345 (1937). Filing a statutory notice is merely an alternative to *in hand* service and is for the benefit of a plaintiff who, for one reason or another, may not be able to make in hand service on an executor and is clearly not a condition precedent to the tolling of the statute of limitations or to the bringing of an action against an executor. *United States* v. *Saxe*, 261 F.2d 316 (1 Cir., 1958). Therefore, Mrs. Hanna is being deprived of her day in court simply because she fully and punctiliously complied with an applicable Federal Rule of Civil Procedure, in a Federal Court sitting in a state which happens to require a different mode of service, designed to give a more "specific" notice, than that provided by Rule 4(d)(1) of the Federal Rules of Civil Procedure.

The significance of such a decision can hardly be overstated. The Court below has held that this is "a substantive rather than a procedural matter" (R27), and this holding will plague litigants in Federal Courts on a nation-

wide scale, for there are no less than twenty-five states whose rules and statutes provide for a mode of service designed to provide the defendant a more "specific" notice of the action pending against him, than the notice provided by Rule 4(d)(1). Provisions of these states range from requirements that service be made on a member of the defendant's family (instead of anyone residing at his home) to a requirement that the sheriff read the summons to the defendant.[1] For example, California requires that service upon a competent adult be made "personally," *Code of Civil Procedure* sec. 416, and service upon a member of the defendant's family is not sufficient service, *Sternbeck* v. *Buch*, 148 Cal. App. 2d 829, 307 P. 2d 970 (1957). Kentucky, *Ky. Rev. Stat., Rules of Civil Procedure*, Rule 4.04, Maryland, *Rules of Civil Procedure* 104(b)(1)(2), and Michigan, Mich. *Rev. Jud. Act* sec. 600. 1912 (1961), also require in hand service (except that if the defendant has an agent for service, service may be made on such agent in Kentucky and Michigan.)

20 *Tenn. Code Ann.* sec. 20-214 (1955) provides that "original process shall be served by reading the same to the defendant, or offering to read it in case he neglects or refuses to hear it read." Thus, under this statute, service upon a husband by leaving the papers with the wife is invalid, even though the husband actually read the summons. *Carter* v. *Kaiser*, Tenn. Ch. App. 48 S.W. 265 (1895).

The New York *Civil Practice Law & Rules* sec. 308 requires that "personal service upon a natural person shall be made by delivering the summons within the state to the person to be served," or upon an agent for service desig-

[1] In addition to Massachusetts, the states are Arkansas, California, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia and Wisconsin.

nated under Rule 318 of the Act. If service cannot be made in compliance with the first paragraph with "due diligence," then, and only then, may substituted service be made. N. Y. *Civ. Prac. Law & Rules*, sec. 308 (3). Even more stringent than N. Y. *Civ. Prac. Law & Rules* is *Miss. Code Ann.*, sec. 1869 (1942). Mississippi requires in hand service upon a defendant, but, if he cannot "be found in the county," service may be made by leaving the process at his home with a member of his family who is "willing to receive" service. If the defendant cannot be found or no member of his family living at home is "willing" to receive service, then the process must be posted "on a door of the defendant's usual place of abode." See also *Ill. Rev. Stat.* (1961) C. 110, sec. 13.2 (member of family upon whom service is made must be "informed" of contents and process mailed to defendant unless the defendant is served in hand).

It requires no prolonged analysis to understand that the provisions of the service statutes and rules of these states are designed to give the defendant specific and reliable notice, just as is *Mass. Gen. Laws* (Ter. Ed.) c. 197 sec. 9 (1958). The decision of the Court below in the case at bar holds that the requirement of in hand service creates a substantive right which is somehow abridged by the application of Rule 4(d)(1). If the Massachusetts statutes creates a substantive right as that term is used in the Enabling Act under which this Court promulgated the Federal Rules of Civil Procedure, 28 *U.S.C.* 2072 (1948), do not all these other state statutes and rules also create substantive rights? With the decision in the case at bar, the Court of Appeals has sown dragon teeth, and this case will be a danger to litigants and a thorn in the side of the Federal Courts throughout the nation. Defendants will not be slow to trap other plaintiffs who have relied on conformity to the Federal Rules relating to service. The case

at bar is not the first. The first is the unreported case of *Doyle* v. *Moylan*, Civil No. 54-507-A (D. Mass., 1955) (Appendix C). The facts of that case are almost precisely the same as the facts of the case at bar. It involved the same statute, and service was made in full compliance with Rule 4(d)(1), within the one-year limitation period in each case. The only differences were that in *Doyle* the defendant did not file an answer within the year, as here, and that in *Doyle*, Judge Aldrich (then a U. S. District Judge) relied on *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) in dismissing the action. Alert counsel all over the nation will use the decision of the Court below, as counsel in this case used *Doyle* v. *Moylan supra*. The basic question involved in this case is nothing less than the future of the Congressional and Judicial policy of uniformity of service, and perhaps of all procedure, in the Federal Courts.

2. THERE IS A CONFLICT BETWEEN THE CIRCUITS.

The decision of the Court of Appeals is in conflict with *Jacobwitz* v. *Thompson*, 141 F.2d 72 (2 Cir., 1944) and *Doyle* v. *Loring*, 107 F.2d 337 (6 Cir., 1939). *Jacobwitz* v. *Thompson, supra* was an action for wrongful death. The defendant, not a resident of New York, was trustee in bankruptcy of a railroad. Jurisdiction was based on diversity of citizenship. The defendant had maintained a financial office in New York and service was made on the "fiscal representative" under Fed. R. Civ. Pro., Rule 4(d)(3). The defendant moved to quash service on the ground that, as a natural person, who was a non-resident, he could be served only in accordance with the New York Civil Practice Act sec. 229-b, which had not been complied with. The Court of Appeals (on cross appeal) affirmed the denial of the motion, holding that since (what is now) 28 U.S.C. sec. 959 (1948) put a receiver on the same footing as a railroad for purposes of

service, service under Rule 4(d)(3) was proper. Federal statutes governing service were thus held applicable even in "diversity cases." The fact that the federal law whose applicability was challenged was a statute and not a Federal Rule of Civil Procedure does not mitigate the conflict between *Jacobwitz* and the case at bar, for two reasons. First, in a diversity case the Federal government may not constitutionally deprive a litigant of state-created substantive rights, *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) and if a litigant has a substantive right to be served in a particular manner, the Federal government may not abrogate that right by decisions, rule or statute. Second, the Federal Rules of Civil Procedure have the force and effect of a Congresional statute. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940); *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949). Thus, *Jacobwitz* stands for the proposition that in diversity cases the mode of service upon a defendant is a matter of procedure, whereas, the Court of Appeals in the case at bar has held that this case involves "a substantive rather than a procedural matter." (R27).

Doyling v. *Loring*, was suit against a foreign administratrix qualified to administer an estate in Tennessee. Jurisdiction was based on diversity of citizenship. Tennessee permitted service upon a qualified foreign executor by leaving process with the county clerk, and the plaintiffs served the defendant under this statute. The Circuit Court of Appeals for the Sixth Circuit held that service was invalid because (1) the venue was improper under Federal law and state law could not change that and held (2) "Moreover, the service of process in equity cases is controlled by Equity Rule 13 . . ." (Equity Rule 13 was the predecessor of Rule 4(d)(1) was substantially the same. See 2 Moore's Federal Practice, 928 (1949).) Admittedly, the conflict here involves an alternative holding, but it is a real conflict, nonetheless, for as this Court stated "where a decision rests on

two or more grounds, none can be relegated to the category of *obiter dictum*. . . ." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537-538 (1949). The fact that *Doyling* v. *Loring*, was a suit in equity is of no consequence as actions at law and suits in equity are merged. Fed. R. Civ. Pro., Rule 2. The questions in *Jacobowitz* and *Doyle* are thus the same as that involved in the case at bar, and both the former cases are irreconcilable with the decision of the Court below.

3. The Decision of the Court of Appeals in the Case at Bar is in Conflict With Applicable Decisions of This Court.

The Court of Appeals has decided that service under Rule 4(d)(1), in the face of a state statute containing stricter service and notice requirements, is a matter of substance. It does not support this holding on the ground that the mode of service would have altered or in any way would have affected the outcome of the litigation, see *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), or that service made under Rule 4(d)(1) deprived the defendant of any real benefit granted by state law or by citing any applicable case. However, the Court below suggests a similarity between the case at bar and *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). The cases are plainly distinguishable. In *Cohen*, New Jersey required a plaintiff in a stockholders suit who owned less than a certain portion of the stock to post a bond to reimburse the defendant for the expenses of the suit if the plaintiff did not make good his claim. This created an obligation where none existed before, and exposed a plaintiff to a new and substantial liability.

Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) also cited by the Court below is inapposite as it involved a question of the timeliness of a suit. The only issue was whether the Kansas statute of limitations

was tolled when the complaint was filed or when service was made, as prescribed by Kansas law. There is no issue of timeliness in the case at bar, for service here did not extend the life of the cause of action by one second. The decision of the Court below cannot be explained as an application of the principles of *Cohen* and *Ragan*.

The *ratio decidendi* of the case at bar is found on Page 27 of the record. (Page 19, *infra*)

> "Special statutes of limitations . . . have been operative in the Commonwealth for over 150 years. Relatively recent amendment evince a clear legislative purpose to require personal notification within the year ascertainable of record. . . ."

The Court of Appeals has thus decided that the requirements of in hand service creates a substantive right, not because of any effect on the result of Federal litigation or because of any benefit to the defendant, but because of the policy of the Massachusetts legislature. Thus, service in hand is held to be a substantive right within the meaning of 28 *U.S.C.* 2072 (1948) because the Massachusetts legislature says so. The Court below has permitted a state legislature to interpret a Federal Statute and thus dictate how process shall be served in the Federal Court. It is the Supremacy Clause of the Constitution of the United States in reverse, and this holding is in conflict with decisions of this Court and other Federal Courts which have held that "state law cannot determine for the Federal Courts what shall be deemed sufficient service of process or sufficient appearance of parties." e.g. *Insurance Co.* v. *Bangs*, 103 U.S. 435 (1880); *Beers et al* v. *Haughton*, 9 Pet. (34 U.S.) 329 (1835) (Story, J.); *Southern Pac. Co.* v. *Denton*, 146 U.S. 202 (1892), *Clark County Nevada* v. *City of Los Angeles*, 92 F. Supp. 28 (D. Nev., 1950).

The significance of the decision of the Court below will be tremendous, if not reviewed by this Court, for it will make the state legislatures the final arbiters of which Federal Rules of Civil Procedures abrogate or enlarge substantive rights, so as to fall beyond the authority granted this Court by 28 U.S.C. 2072 (1948). If the legislative history of *Mass. Gen. Laws* (Ter. Ed.) c. 197 sec. 9 (1958) is the test of whether or not the application of Rule 4(d)(1) abrogates a litigant's substantive rights, then the legislative history of the California Code of Civil Procedure, of the Mississippi Code, of the Illinois Revised Statutes, and of the New York Civil Practice Act will determine whether Rule 4(d)(1) or any other Federal Rule of Civil Procedure has abrogated or enlarged a litigant's substantive rights. This decision permits the states to interpret a Federal statute and decide if the Supreme Court of the United States has exceeded the authority to promulgate rules of procedure granted it by Congress. If Article VI, Cl. 2 of the Constitution of the United States has any relevance to the Federal Judiciary which is created under the authority of Article III of the Constitution, the decision of the Court below must not stand unreviewed or unclarified by this Court, for it will destroy not only uniformity of Federal Civil Procedure, but will weaken the independence of the Federal Judicial System, for "Substantive Right" has been translated into "States' Rights." The fact that the respondent is an executor in no way weakens the destructive thrust of the opinion of the Court below. The Court of Appeals seems to attach no significance to the defendant's capacity except to allude to the defendant as "a creature of the Massachusetts Court." It is quite clear that an executor is not a creature of the state, as is a corporation. An executor is a natural person (whose liability is personal to the extent of the estate assets) who is granted the authority by the Probate Court to administer

a decedent's estate. He is no more a creature of the state than is a partner. See *Boudreau* v. *New England Transportation Co.*, 315 Mass. 423; 53 N.E. 2d 92 (1944). Furthermore, the service statutes of other states seems to apply to all defendants who are natural persons, whatever their capacity. Furthermore, the Court of Appeals has also misconceived the importance to the Commonwealth of Massachusetts of the requirements of *Mass. Gen. Laws* (Ter. Ed.) c. 197 sec. 9 (1958), for section 12 of that chapter provides procedures for relief to a plaintiff whose action fails for a defect in service because of "unavoidable accident" and Section 10 even provides in certain cases for relief when an action is not commenced in time. Although these sections might not aid the petitioner in reinstating this action, they do indicate that the assumption of the Court below that section 9 is so vital to the State's rights, that a Federal Rule of Civil Procedure may not be applied in a "Diversity case," is not justified.

The decision of the Court below is also in conflict with cases decided by this Court involving the issue of what is to be considered procedural and what shall be considered substantive. The inquiry has been invariably directed to the effect of the challenged rule on the outcome of the litigation, *Erie R. R. Co.* v. *Tompkins, supra, Guaranty Trust Co.* v. *New York, supra, Mississippi Publishing Co.* v. *Murphree*, 326 U.S. 438 (1945) (Rule 4(f) held procedural) and to the effect of a particular classification of the rule in question on a conflicting Federal policy. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958). The decision of the Court below is in conflict with the cited decisions of this Court, for the Court of Appeals never inquired whether or not a particular mode of service upon a defendant would substantially affect the outcome of this litigation. The method by which a litigant is brought before the Court and is given notice of the pending action,

Sechrist v. *Palshook*, 97 F. Supp. 505 (M.D. Pa. 1951), cannot possibly affect the outcome of the law suit, and, thus, cannot reasonably be classified as a matter of "Substance."

Furthermore, the Court of Appeals never gave any consideration to the Federal policies of uniformity of procedure throughout the District Courts of the United States, or the policy of permitting "freedom and flexibility of procedure in bringing home to the defendant . . . notice of the filing of the action." Barron & Holtzoff, *Federal Practice and Procedure*, sec. 171 (1960). In view of the non-existent effect of the mode of service, on the outcome these considerations of Federal policy should have been given controlling weight in the decision of this case. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and see *Iovino et al* v. *Waterson*, 274 F.2d 41, 2nd Cir., 1959). Its refusal to do so puts it in conflict with *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, *supra*, and was grave error.

Conclusion

This case presents troublesome issues of national importance in the administration of justice in the Federal Courts. Half the states in the union have service requirements which are designed to give a defendant more specific notice than do the Federal Rules of Civil Procedure, and the decision of the Court of Appeals could be applied in many if not all those states. There is a conflict between the decision of the Court below and the second and sixth circuits on the issue of whether in a diversity case the mode of service is a matter to be governed by the state law or Federal law.

Furthermore, the decision of the Court below is based on premises which challenge the application of the Supremacy Clause of the Constitution and is based on an approach to

the problem of the source of law in a diversity case completely at odds with the applicable decisions of this Court. Therefore, for these reasons, and because the plaintiff, has been deprived of a fair hearing of her claim simply because she followed the applicable Federal Rules of Civil Procedure, this Honorable Court should grant a writ of certiorari.

Respectfully submitted,

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Appendix A

UNITED STATES CONSTITUTION

ARTICLE VI, CLAUSE 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. SEC. 2072 (ENABLING ACT)

SEC. 2072. RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> • • • •
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, sec. 103, 63 Stat. 104; July 18, 1949, c. 343, sec. 2, 63 Stat. 446; May 10, 1950, c. 174, sec. 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, sec. 12(m), 72 Stat. 348.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 4—PROCESS, (d)—SUMMONS: PERSONAL SERVICE.

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

MASS. GEN. LAWS (TER. ED.) c. 197 SEC. 9 (1958)

SEC. 9. COMMENCEMENT OF ACTION; EXTENSION OF LIMITATIONS BY COURT.

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . .

Appendix B

United States Court of Appeals
For the First Circuit

No. 6272.

EDDIE V. HANNA,
PLAINTIFF, APPELLANT,
v.
EDWARD M. PLUMER, JR., EXECUTOR,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Albert P. Zabin, with whom *Schneider & Reilly* was on brief, for appellant.
Alfred E. LoPresti and *James T. Connolly* for appellee.

OPINION OF THE COURT.

April 29, 1964.

ALDRICH, *Circuit Judge*. This is an action in which plaintiff, a citizen of Ohio, claims damages in excess of $10,000 for personal injuries as a result of an automobile accident in South Carolina allegedly caused by the negligence of a Massachusetts citizen, now deceased. The defendant, also a Massachusetts citizen, is the decedent's executor. The defendant qualified as executor by filing bond on March 1, 1962. On February 6, 1963 the complaint was filed in the district court for the District of Massachusetts. On February 8 service was made by leaving a copy of the summons

with the defendant's wife at his residence, in compliance with F.R.Civ.P. 4(d)(1). The defendant's answer was filed on February 26. The so-called "short statute of limitations," Mass. G.L. (Ter. Ed.) c. 197 §9, provides that actions against an executor must be "commenced within one year from the time of his giving bond." In addition to timely commencement, the statute provides that the executor "shall not be held to answer" unless within the year he had been served in hand, or "service . . . [is] accepted by him," or there has been filed in the proper registry of probate a notice identifying the claim, the claimant and "the court in which the action has been brought." In her complaint plaintiff alleged that she had already filed the requisite notice in the registry of probate, and asserted that the action had been brought "within the time required and in accordance with the procedure of the law of the Commonwealth of Massachusetts in [sic] filing suit against the said decedent's Estate." Defendant's answer denied these allegations, and affirmatively alleged that the action could not be maintained because it had been "brought contrary to and in violation of the provisions of . . . Section 9." At the time the answer was filed it was in fact still possible to comply with the statute. However, plaintiff took no further action.

After March 1, 1963 defendant moved for summary judgment with an affidavit revealing that the notice filed in the probate registry made no mention of the court in which the action had been or even was to be brought, or, indeed, that any action was even contemplated. No countering affidavit was filed. The notice thus must be taken as materially defective. *Cf. United States* v. *Saxe*, 1 Cir., 1958, 261 F.2d 316, 320. Alternatively, the service of process did not satisfy the special notice requirements of the executor's statute, not having been made in hand, nor had the defendant in terms accepted service. The district court,

holding the Massachusetts statute was controlling and on these facts not complied with, granted the defendant's motion for summary judgment. From this plaintiff appeals.

In this court plaintiff abandons the allegations of her complaint that she had complied with the Massachusetts "procedure," but asserts that such compliance was unnecessary because, since the action was brought in the federal court, the matter was one of federal procedure governed by F.R.Civ.P. 4(d)(1). We think it clear, however, that we are concerned with a substantive rather than a procedural matter. The service of process by the so-called "last and usual" method was in entire compliance with both Rule 4(d)(1) and the usual Massachusetts procedure, so far as service was concerned. Further, the action was commenced in time, and served in time, in full compliance with the requirements of the ordinary Massachusetts statutes of limitations. The difference was that in addition to service sufficient to satisfy due process requirements for in personam jurisdiction, the executor, a creature of the Massachusetts court charged with the administration and disposition of the estate sought to be reached, was by law entitled to receive specific notification of the action within the year. Special statutes of limitations to effectuate the safe and "speedy settlement of estates that the heirs might be quieted," *Brown v. Anderson*, 1816, 13 Mass. 201, 202, have been operative in the Commonwealth for over 150 years. Relatively recent amendments evince a clear legislative purpose to require personal notification within the year, ascertainable of record. St. 1931, c. 417, §1; St. 1954, c. 552, §1. See discussion in *Parker* v. *Rich*, 1937, 297 Mass. 111, 113; Judicial Council of Massachusetts Twenty-ninth Report 46 (1953), 38 Mass. L.Q. 46 (December 1953). This matter is quite apart from the question of what is adequate service of process in the procedural sense. Actual, record notice

would appear fully as substantive a state requirement binding in the federal court as is a requirement that in certain actions a bond must be furnished for costs. *Cf. Cohen* v. *Beneficial Loan Corp.*, 1949, 337 U.S. 541. And see, in a more closely related question, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 1949, 337 U.S. 530.

Since the defendant's success would seemingly entirely bar plaintiff's remedy, and in view of the importance of the matter, even though plaintiff does not argue the point we will consider the correctness of defendant's contention that the Massachusetts statute was not in substance satisfied. We put to one side any contention that the statutory requirements were so loose that actual notice might be established by proof aliunde. *But cf. Fleisher Eng'r & Constr. Co.* v. *United States*, 1940, 311 U.S. 15. The statutory rigidity, which its history shows has been increased rather than diminished, forbids such a construction. On the other hand, an examination seems warranted of the consequence of the voluntary filing of an answer when the statute states that an answer shall not be required. We would agree that the filing of an answer after the year had expired would be without legal effect in view of the settled Massachusetts principle that an executor cannot waive absolute rights of his estate. *Finance Corp. of New England* v. *Parker*, 1925, 251 Mass. 372; *Rosenblatt* v. *Foley*, 1925, 252 Mass. 188; *Gallo* v. *Foley*, 1936, 296 Mass. 306, 310; *Epstein* v. *Blender*, 1957, 15 Mass. App. Dec. 74. However, where such rights have not become established, the filing of a general appearance or answer within the year might well be regarded as an acceptance of service, an action specifically authorized. *Cf. Tobin* v. *Downey*, 1942, 310 Mass. 721; *Lapresti* v. *Burton*, 1936, 295 Mass. 6. That, however, is not this case. We could not construe as an "acceptance" of service an answer which specifically complained of the impropriety of the service and the lack of proper notice. *Cf.* F.R.Civ.

P. 12(b). If this view be thought unduly technical we might add that it is entirely conceivable that the decedent driver was insured, and that the summons may have been forwarded to the company, and by it to its counsel, without any action by or actual notice to the executor.

Judgment will be entered affirming the judgment of the District Court.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 54-507-A

JOHN DOYLE

v.

MARGARET G. MOYLAN, Ex'x

OPINION

November 17, 1955

ALDRICH, D.J.

This motion for summary judgment raises a very narrow question. The defendant was appointed executrix on June 26, 1953. On June 24, 1954 the plaintiff, having a claim against the estate, commenced an action in this court by filing a complaint and taking out a summons. The summons was served by the deputy marshal the following day by leaving a copy with the defendant's husband at her usual place of abode; the defendant not being home. Her husband gave her the papers that evening. This was a "usual place of abode" service within Rule 4(d), but it was not a service in hand, the husband not having been specifically appointed by the court under Rule 4(c).

Throughout June, 1954, Mass. Gen. Laws, Ch. 197, §9, the short statute of limitations, read in part as follows:

> "Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced *but not entered* within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such

executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate . . ." (ital. suppl.)

This being a diversity case, this court is bound by the state statute. *Guaranty Trust Co.* v. *York*, 326 U.S. 99. It is clear that if this statute had not contained the italicized words "but not entered" (which words have since been stricken therefrom — Mass. Acts 1954, Ch. 552, §1), the action would be barred. Service in hand is now always required in an action against an executor or administrator unless the requisite notice of the action is filed in the proper Registry of Probate. No such notice was filed in the case at bar.

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